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The General Revision of the Copyright Law—From Bare Bones to Corpulence— A Partial Overview

ANDREW E. KATZ*

INTRODUCTION

The copyright law of the United States¹ was given its last general revision in 1909.² That law, with minor amendment remained the United States Law of Copyright until the recent enactment of the General Revision of Copyright Law, which Act was signed into law by President Gerald R. Ford on October 19, 1976.³ The old law was considered a bare bones act, short on

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1. The Law of Copyright is enacted by Congress pursuant to its power under the Constitution, article I, section 8, clause 8 which grants Congress the power:

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

2. Act of March 4, 1909, ch. 320, 35 Stat. 1075, effective July 1, 1909. The act was enacted into positive law as 17 U.S.C. § 1 *et seq.* by the Act of July 30, 1947, ch. 391, 61 Stat. 652.

3. Pub. L. No. 94-553, 90 Stat. 2541. Although this Act provides that, with minor exception, its provisions do not become operative until January 1, 1978, for purposes of convenience the law in effect until that date will be referred to herein as the "old law" while the law in effect after that date will be referred to herein as the "new law".

words, and for that reason rigid and not susceptible to easy application to new technologies.⁴ The old law was indeed short, consisting of sections of limited length and totalling only approximately 23 pages minus annotations, as published in United States Code Annotated by West Publishing Co. The new law, on the other hand, not including the transitional sections, consists of some 57 pages, as published as Public Law 94-553. The new law also contains several sections which are each several pages in length. Compared to the law which it replaces, the new law is indeed, corpulent. Whether the new law lives up to its promise of settling various issues which have recently vexed the courts with respect to copyright is yet to be seen. A partial overview of the new law, however, demonstrates that it raises perhaps as many problems as it solves, and may very well not have the promised flexibility, nor solve the problems which gave rise to its enactment in the first place.⁵

DEFINITIONS

Unlike the old law which has no section dealing exclusively with the definition of the various terms and phrases which appear throughout the law, the new law does contain such a section. Section 101 defines various phrases and words used throughout the new law which definitions appear for the most part to conform to the meanings of those words as they are understood whether in general usage, or as used by the courts with respect to the old law. However, definitions given to certain words and phrases are so ambiguous or incomplete that further modification will be required either by congressional amendment or judicial gloss. Certainly, to the extent that a controversy arises wherein the definition proves to be important, both copyright owners and copyright users should take care to explore the existing ambiguities,⁶ some of which are examined below.

4. See, e.g., *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (majority opinion), 165 (dissenting opinion of Justice Blackmun), 168 (dissenting opinion of Chief Justice Burger) (1975); and *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394, 415-16 (1974).

5. This partial overview concentrates almost exclusively on Chapter One of the new law. Chapter One is entitled "Subject Matter and Scope of Copyright" and it is the heart of the new law. As this article is intended as an overview it will not deal with each section in Chapter One. For a view with respect to other portions of the new law see A.S. KATZ, *The 1976 Copyright Revision Act and Authors' Rights: A Negative Overview*, 4 PEPPERDINE L. R. 171 (1977).

6. For some words used throughout the act no definition is provided by Section 101. An example is the word "dramatic". In several sections, e.g. 110, 115, and 116, the extent of the author's rights with respect to the work depends

Audiovisual Works and Motion Pictures

The new law defines audiovisual works as . . .

works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.⁷

It would appear from this definition that the term "audiovisual works" is intended to relate to the work as finally perceived by a viewer, regardless of the physical object on which the work is embodied, *e.g.*, whether it be film or tape. However, as the definition speaks of a series of related images, it creates an ambiguity. As most people of common knowledge are aware videotape, unlike film, does not of itself appear to contain any images when viewed by the naked eye, related or otherwise. When viewed by the naked eye it is impossible to tell whether the videotape is blank, contains only sounds, or sounds and information which, when digested by appropriate electronic machinery, will create an image on a television screen. Film, on the other hand, does consist of a series of related images which are readily apparent to the naked eye. The necessity of the phrase "series of related images" is therefore not clear. Would a work fail as an audiovisual work if it consisted solely of a single image which did not vary throughout the work but was accompanied with the sounds of an off-camera narration describing the image?

The definition of "motion pictures" is that they are" . . . audiovisual works consisting of *a series of related images* which when shown in succession, impart an impression of motion, together with accompanying sounds, if any."⁸ Defining motion pictures as those audiovisual works (which by their own definition are to consist of a series of related images) which consist of a series of related images which impart an impression of motion thus further adds to the confusion concerning the meaning of

on a finding that the work is either dramatic or not dramatic. As is noted by Professor Nimmer in his treatise, the cases in this area have not fashioned a comprehensive definition of the meaning of dramatic. 1 NIMMER ON COPYRIGHT § 16.1 (1976). Even though the distinction can be critical to the author's rights in his work, the new law provides no further guidance than existed prior to its passage.

7. 17 U.S.C. § 101 (New law).

8. *Id.* (emphasis added).

the phrase "series of related images." Apparently motion pictures are intended to be a sub-class of audiovisual works, audiovisual works being all works consisting of a series of related images (however defined) while motion pictures are those works within that category which also impart an impression of motion. But, if to satisfy the general definition of audiovisual works it is not necessary for the work to impart an impression of motion, the need for the work to consist of a series of related images is mystifying; particularly in light of the fact that the nature of the material object in which the work is embodied is irrelevant.

It would appear from the Report of the House of Representatives that the purpose of the "series of related images" requirement was to include within audiovisual works works such as film strips, slide sets and sets of transparencies rather than placing those items within the classification of pictorial, graphic, or sculptural works.⁹ If this is the case, then it would appear the phrase "a series of related images" should itself have a definition to the effect that it implies images placed in a specific sequence or order by the author of the work, the relation arising by the work of the author and not referring to an inherent relationship between the images themselves as ultimately perceived. The act itself, however, does not compel this conclusion.

Copies and Phonorecords

The definitions for these two terms make it clear that they relate to the "material objects" in which the work is fixed by any method now known or later developed.¹⁰ Copies are essentially all material objects while phonorecords are material objects in which sounds other than those accompanying a motion picture

9. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 122 at 56 (1976), together with additional views to accompanying S.22 [the General Revisions of Copyright Bill] of the Judiciary Committee of the House of Representatives [hereinafter, the HOUSE REPORT].

10. "Copies" and "Phonorecords" are defined by § 101 as:

'Copies' are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term 'copies' includes the material object, other than a phonorecord, in which the work is first fixed. * * * 'Phonorecords' are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term 'phonorecords' includes the material object in which the sounds are first fixed.

or other audiovisual work are fixed. These terms appear to be all encompassing and appear generally together throughout the new law. According to the House Report, fixation of a work is one of the two statutory criteria for copyright protection, the other being originality.¹¹ The Report continues and points out that the purpose of these definitions is to prevent unnecessary and artificial distinctions between the works of an author and the form, manner or medium in which the work is fixed or embodied.¹² The definitions of copies and phonorecords are, together, to comprise all material objects in which works of an author are fixed by any method now known or later developed.¹³

Created and Derivative Work

The definitions of "created" and "derivative work," while each is indeed intended to cover separate territory, present an overlap which may cause confusion.¹⁴ The definition of "created" is of critical importance under the new law as it is the

11. HOUSE REPORT, note 9, *supra* at 51.

12. An early example of this distinction is found in *White-Smith Publications Co. v. Apollo Co.*, 209 U.S. 1 (1908). See also, HOUSE REPORT at 52-53.

13. The definitions of these terms [copies and phonorecords] in section 101, together with their usage in section 102 and throughout the bill, reflect a fundamental distinction between the original work which is the product of 'authorship' and the multitude of material objects in which it can be embodied. Thus, in the sense of the bill, a 'book' is not a work of authorship, but is a particular kind of 'copy'. Instead, the author may write a 'literary work' which in turn can be embodied in a wide range of 'copies' and 'phonorecords', including books, periodicals, computer punch cards, microfilm, tape recordings, and so forth.

HOUSE REPORT at 53. This concept is fundamental to the new law and is one which will require an adjustment in the language used by most authors and copyright practitioners. As the HOUSE REPORT example demonstrates, an author will no longer write a book, nor a song writer a musical; rather, they will create respectively a literary work and a musical work. The material object in which the respective works are first fixed will then become copies or phonorecords.

14. A work is 'created' when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work."

A 'derivative work' is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a 'derivative work'.

Pub. L. No. 94-533, 90 Stat. 2542; 17 U.S.C. § 101 (New law).

fixation of a new work in a copy or phonorecord for the first time which constitutes one of the two fundamental steps required to invoke copyright protection.¹⁵ If this were the full definition of "created," there would be no confusion. However, the definition continues and provides that where a work or a portion of it has been fixed at any particular time it constitutes the work *as of that time*, and that where the work has been prepared in different versions, each version constitutes a separate work.¹⁶

A derivative work is defined as a work which is based upon one or more "pre-existing works." The definition also states that a work consisting of "editorial revisions, annotations, elaborations, or other modifications" may also constitute a derivative work.¹⁷ The question then arises whether every succeeding draft of a literary work and every preliminary sketch used by an artist prior to creating a pictorial work (as they are each fixed, *i.e.*, created) is itself a separate work, or a derivative work. It would appear from the definitions that each draft or successive sketch would constitute a different version of its predecessor as each became fixed, and that each would likewise also constitute a derivative work of its predecessor. Whether each successive work is a separate work or a derivative work, it is imperative that the author (using that term in its constitutional sense to include all who create copyrightable works) be sternly lectured to prevent all publication of such drafts or preliminary sketches unless they are published with the notice required by the new law. Should the author fail to follow this prescription he may needlessly dedicate a previously published and fully copyrighted work to the public domain.¹⁸

15. See note 11 *supra*.

16. See note 14 *supra*.

17. *Id.*

18. This conclusion follows because under the new law, as under the old, a derivative work may only protect that which is original to it, and not that which was subject to protection or protected as the work upon which it was based. See Section 103(b) of the new law and HOUSE REPORT, note 9, *supra* at 57. If a copyright owner allows the publication of a prior work, upon which the ultimately published and copyright derivative work was based, without appropriate notice, that prior draft or sketch enters the public domain. Being in the public domain, the expression of the work as contained in the prior draft or sketch can be freely used without compensation to the copyright owner of the earlier published derivative work. Thus, whether succeeding drafts or sketches are treated as separate works under the definition of "created", or as derivative works, it is apparent that under the new law each has its own separate and distinct legal identity. Accordingly, each draft or version must be guarded and treated by the author at all times as a separate work, subject to copyright protection, and subject to divesting the author of his copyright if due diligence is not pursued.

Pictorial, Graphic and Sculptural Works and Useful Articles

The definitions given these terms provide the battleground upon which some of the most interesting controversies may be fought with respect to the scope of the new law.¹⁹ The battleground, indeed, may have constitutional proportions. Under the definition of pictorial, graphic and sculptural works the new law includes technical drawings, diagrams and models. Also included are works of artistic craftsmanship and designs for a useful article, but only to the extent that such design incorporates "pictorial, graphic or sculptural features that can be identified separately from, and are capable of existing independently of the utilitarian aspects of the article."²⁰ The definition of a useful article is convoluted, requiring a consideration of whether the article has an intrinsic utilitarian function which is not merely the portrayal of the article or the transmission of information. A definition of this definition would be helpful. The House Report discusses these definitions in connection with its evaluation of section 102 of the new law. Its discussion, unfortunately, stops short of answering the critical question of how the line is to be drawn between that which can be identified separately from and is capable of existing independently of the utilitarian aspect of the useful article (and is therefore subject to full copyright protection as a pictorial, graphic or sculptural work) and that which cannot.²¹

19. 'Pictorial, graphic, and sculptural works' include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, technical drawings, diagrams, and models. Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.

A 'useful article' is an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally a part of a useful article is considered a 'useful article'.

17 U.S.C. § 101 (new law).

20. 17 U.S.C. § 101 (new Law).

21. The HOUSE REPORT states, with respect to the line drawing problem that [o]n the other hand, although the shape of an industrial product may be aesthetically satisfying and valuable, the Committee's intention is not to offer it copyright protection under the bill. Unless the shape of an automobile, airplane, lady's dress, food processor, television set, or any

Further, according to the House Report,²² the definitions of pictorial, graphic and sculptural works and of useful articles are to be consistent with the decision of the United States Supreme Court in *Mazer v. Stein*.²³ In that case, the Court ruled that a statuette which was the base of a lamp was a writing in the constitutional sense and, accordingly subject to copyright. More recently, in *Esquire, Inc. v. Ringer*,²⁴ Judge Gesell ruled that light fixtures which serve both to decorate and to illuminate, must, consistent with *Mazer v. Stein*, be afforded copyright protection. The court thereupon entered summary judgment in favor of Esquire, Inc. compelling defendant Ringer, the Register of Copyrights, to register the item for copyright. The court ruled that even though the Register insisted that utilitarian objects with aesthetic shape could not be copyrighted, *Mazer v. Stein* holds to the contrary. In this regard the court ruled:

These outdoor lights serve both to decorate and to illuminate. Indeed, during the day they are exclusively decorative. They are a type of sculpture which is both original and aesthetically pleasing. Surely, they would satisfy a Gropius or Brancusi far more than would a Rembrandt portrait, and to many they are more artistic than some examples of sculpture found at such museums as the Corcoran or the Hirshhorn. Art through the ages has often served a utilitarian purpose. The Caryatids of the Acropolis or Cellini's exquisite Saltcellar are two of the many examples of traditional art serving such a purpose. There has always been a close link between art and science. The forms represented by Esquire's fixtures emphasize line and shape rather than the realistic or the ornate but it is not for the Register to reject them on artistic grounds, *Bleistein v. Donaldson Lithographing Co.*, *supra*, or because the form is accommodated to a utilitarian purpose, *Mazer v. Stein*, *supra*. There cannot be and there should not be any national standard of what constitutes art and the pleasing forms of the Esquire fixtures are entitled to the same recognition afforded more traditional sculpture.²⁵

Under the new law the result would be the same. According to

other industrial product contain some element that, physically or conceptually, can be identified as separable from the utilitarian aspects of that article, the design would not be copyrighted under the bill. The test of separability and independence from the 'utilitarian aspects of the article' does not depend upon the nature of the design that is, even if the appearance of an article is determined by aesthetic (as opposed to functional) considerations, only elements, if any, which can be identified separately from the useful article are as such copyrightable and, even if the three dimensional design contains some such element (for example, a carving on the back of a chair or a floral relief design on silver flatware) copyright protection would extend only to that element, and would not cover the overall configuration of the utilitarian article as such. HOUSE REPORT, Note 9, *supra* at 54-55.

This statement by the Committee offers no more assistance to those who will be called upon to litigate and to judge than does the act itself.

22. *Id.* at 54.

23. 347 U.S. 201 (1954).

24. 414 F. Supp. 939 (D.D.C. 1976).

25. *Id.* at 941 (footnote omitted, emphasis added).

the Court in *Esquire*, during the daytime the outdoor fixtures were entirely decorative, *i.e.*, not utilitarian. Accordingly, they were in their entirety capable of existing independently of their utilitarian aspect. The language of the new law thus seems to be broader than the statements of the Committee as expressed in the House Report. Under the statements contained in the House Report, though the fixtures in *Esquire* were of an aesthetically satisfying and valuable shape, this would be an inadequate distinction to allow copyright. The House Report seems to call for the very consideration which the United States Supreme Court in *Mazer v. Stein* and the district court in *Esquire* ruled to be impermissible—a consideration by the Register of Copyrights of what is, and what is not, art. The broad language of the House Report in connection with the ambiguous language of the definitions of pictorial, graphic, sculptural works and useful articles will certainly lead to confusion. The approach of the courts in *Mazer v. Stein* and *Esquire* is more satisfying. As this approach is intended to be followed by the new law,²⁶ the new law must be read to extend copyright, rather than to limit it, when the work in question has a utilitarian function.

An additional line drawing problem presented by the “useful article” limitation on pictorial, graphic and sculptural works is the extent to which copyright is available for architectural drawings. The House Report acknowledges that the architect’s plans and drawings would, of course be protected by copyright. However, the extent of that protection is to be dependent upon the circumstances.²⁷

Purely non-functional or monumental structures would be subject to full copyright protection under the bill, and the same would be true of artistic sculpture or decorative ornamentation or embellishment added to a structure. On the other hand, where the only elements of shape in an architectural design are conceptually inseparable from utilitarian aspects of the structure, copyright protection for the design would not be available.²⁸

However, where is the line to be drawn for an architectural design for a home, for example. As anyone who has ever visited

26. See note 19 *supra*.

27. HOUSE REPORT, note 9, *supra* at 55. For a discussion of the copyrightability of architectural drawings under the old law, see A.S. Katz, *Copyright Protection of Architectural Plans, Drawings and Designs*, 19 LAW & CONTEMP. PROB 224 (1954).

28. HOUSE REPORT, Note 9, *supra* at 55.

the sales office of a new residential development is aware, the builder frequently has three or four floor plans, each of which has two, three or more different frontal elevations. One elevation may consist of a wholly smooth-stuccoed exterior with a crushed-rock roof. Another may have a brick exterior with a shake roof, and a third a rough stuccoed exterior designed to resemble adobe mission exterior with a spanish tile roof. Likewise, even given the limitation of being compelled to design a four-bedroom house with two bathrooms, a living room, dining room, kitchen and recreation room consisting of approximately 2,000 square feet, any architect worthy of his title would certainly be able to design several floor plans which would each meet those utilitarian criteria, but which would also each comprise a different work of the architect's artistry. A house is *per se* utilitarian. However, each separate expression of that four-bedroom house exhibits its individual artistic layout and elevation which sets it apart from any other work by any other architect. It can thus be readily argued that every house taken as a whole is an artistic work separate and apart from its utilitarian aspects. As such, not only should the architect's two-dimensional plans and drawings be protected by copyright, but so too should the house ultimately built from those plans and drawings be protected. The house would certainly be a material object, and it would likewise be a three-dimensional fixation of the architect's artistic endeavors. Further, as the three-dimensional work would be based upon one or more pre-existing works (the two-dimensional drawings), it would be a derivative work. Presuming that the architect had properly protected his drawings, the expression of his work in the material object of the three-dimensional structure should therefore itself be protectable. The language of the House Report would thus seem to be unduly restrictive, particularly in light of *Mazer v. Stein* and *Esquire* and inconsistent with the sage advice of those courts that it is not a function of the copyright law to determine that which is art and therefore, subject to protection and that which is not.²⁹

29. Title II of S.22 provided specific, limited, short-term protection for ornamental designs and useful articles and works of applied art. The House amendment to S.22, which consisted in essence of the House version of the revised copyright law, deleted Title II in its entirety. This amended version was approved at the House-Senate Conference and Title II was thus deleted from the Act as adopted. H.R. CONF. REP. NO. 1733, 94th Cong., 2d Sess. 122 (1976). (hereinafter CONFERENCE REPORT). The reasons for the deletion by the House of Title II are set forth in the HOUSE REPORT at pages 49-50. To the extent that a bill in the nature of Title II is considered in the future as a separate enactment, or as further amendment of the new law, the Congress would be well advised to

The Divisibility of Copyright

A salutary step taken by the new law is the conclusion inherent in the definition of the phrase "transfer of copyright ownership" that a copyright owner may deal separately and individually with each of the various rights contained in a copyright.³⁰ In other words, it is now clear that a copyright is not a single right that is not divisible, but rather, is indeed a bundle of rights, each of which may be separately assigned, mortgaged, licensed, conveyed alienated or hypothecated. Previously, the indivisibility doctrine that a copyright was but a single right was a subject of controversy.³¹

THE SUBJECT MATTER OF COPYRIGHT, SECTION 102

Section 102, in subpart (a) basically provides that copyright protection exists for original works of authorship fixed in some tangible medium of expression whether or not a machine or device is needed to perceive, reproduce or otherwise communicate the work. Works of authorship are specified to "include" seven categories, with the word include being defined by section 101 as a word of illustration and not limitation.³² Subpart (b) of section 102 makes clear that copyright protection extends only to the expression of the work and not to ideas, principals or concepts. In this regard, the new law is consistent with the old.

According to the House Report, the phrase "original works of authorship" in section 102(a) was used for purpose of expressly avoiding the exhaustion of the constitutional power of Congress to legislate in the field.³³ Notwithstanding the lan-

consider carefully the effect of such legislation on that group of authors known as architects, and to make it clear that architects maintain the copyright not only to the two-dimensional drawings created by them but also to the ultimate structure, a derivative work, created from those two-dimensional drawings.

30. "Transfer of Copyright Ownership" is defined in § 101 as: "A 'transfer of copyright ownership' is an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license." (Emphasis added).

31. See, e.g., *Goodis v. United Artists Television, Inc.*, 425 F.2d 397 (2d Cir. 1970).

32. The seven categories are literary works, musical works, dramatic works, pantomimes and choreographic works, pictorial, graphic and sculptural works, motion pictures and other audiovisual works and sound recordings. See, also, HOUSE REPORT, note 9, *supra* at 53.

33. HOUSE REPORT at 51. The HOUSE REPORT continues:

Authors are continually finding new ways of expressing themselves, but it is impossible to foresee the forms that these new expressive

guage of the House Report, all writings (in the constitutional sense), when fixed, would seem to be subject to federal protection under sections 102, 103, and 301(a).³⁴

With respect to section 102(b), the effect of this section must be viewed in light of its purpose. The purpose of section 102(b) may be to state that the works therein listed are indeed "writings" in the constitutional sense, but that Congress chooses not to protect them by the new law. If so, the result is that any works falling in this category by reason of federal preemption, would not be subject to either federal or state protection under the doctrine of the *Sears* and *Compco* cases.³⁵ However, if the intent of section 102(b) is to state that works falling under it are not "writings" in the constitutional sense, and that accordingly Congress has no power to legislate with respect to any of such works, then the states would be at liberty to protect such works under state law without fear of federal preemption.³⁶ Congress may not preempt where it has no constitutional power to act.³⁷ The Supreme Court has never decided what the limits are of the term "writings" as used in the United States Constitution article I, section 8, clause 8. Justice Douglas, in his dissenting opinion in *Mazer v. Stein*, urged that case be set down for reargument so that the scope of the term "writings" could be properly discussed in terms of its constitutional limits.³⁸ According to the House Report, section 102(b) is intended merely to restate in the new law that the distinction between protection of the expression and non-protection of the idea remains unchanged.³⁹ Protection for the items specified in section 102(b) under state law is then still possible to the extent the items set forth therein are

methods will take. The bill does not intend either to freeze the scope of copyrightable technology or to allow unlimited expansion into areas completely outside the present congressional intent. Section 102 implies neither that this subject matter is unlimited nor that new forms of expression within that general area of subject matter would necessarily be unprotected.

34. Section 301(a) preempts state protection for any work when it is fixed if it is subject to § 102 or 103. Section 301(d) revives in part *Goldstein v. California*, 412 U.S. 546 (1973).

35. *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964), and *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964). The basic tenet of these cases is that when a product is capable of being but is not protected by federal patent or copyright protection it may not be protected under a state unfair competition statute as federal law preempts and the product is thrust into the public domain.

36. See, also, § 301(b) which specifically allows State law protection for works not "within the subject matter of copyright as specified in Sections 102 and 103, including works of authorship not fixed in any tangible medium of expression", and *Goldstein v. California*, 412 U.S. 546 (1973).

37. *Goldstein v. California*, 412 U.S. 546, 552-53 (1973).

38. *Mazer v. Stein*, 347 U.S. 201, 219-21 (1954).

39. HOUSE REPORT, note 9, *supra* at 57.

not writings in the constitutional sense, and thus not properly within the power of Congress to protect or preempt.

THE AUTHOR'S EXCLUSIVE RIGHTS IN COPYRIGHTED
WORKS, SECTION 106

The purpose of section 106 is to provide all rights to the copyright owner, dependent upon the type of work involved, subject to the limitations of sections 107 through 118. Apart from the constitutional challenge to sections 107 through 118, which will be discussed *infra*, section 106 seems to be unnecessarily restrictive. The restriction is primarily one of omission and oversight. For instance, with respect to subparts 4 and 5 of section 106, which give the copyright owner of certain categories of works the right to perform or display the copyrighted work publically, there is no provision made for copyrighted works not among the categories listed in section 102. As discussed above, it seems quite clear from section 102 itself, and from the House Report that other categories of works not listed may very well be the natural subject matter of copyright without the need of additional congressional action. Yet, even if those other works are similar in nature to literary, musical, dramatic, choreographic, pantomime, motion picture or other audiovisual works or sound recordings, the owner of that new but unenumerated category of work would not have the right to perform or display the copyrighted work publically. As the stated purpose of the new law is to provide greater flexibility with respect to artistic works made possible by new technological developments, additional language in sections 4 and 5 such as "or similar works" or "works of a similar nature to the enumerated works" ought to be added by amendment, or if not by amendment then surely by judicial gloss.

With respect to the previously discussed dilemma of that class of authors known as architects, unless the three-dimensional structure depicted by the two-dimensional architectural plans and drawings is considered a derivative work, section 106 fails to give the architect the right to prevent the unauthorized building of the structure depicted in his copyrighted plans and drawings. Having created and obtained copyright protection for his architectural drawings, the architect has indeed a hollow copyright if he cannot prevent a third party from reproducing

the structure depicted in those plans and drawings. A third party would merely have to take the necessary measurements from a structure previously built according to those plans and drawings, and from those measurements create a new structure virtually identical with that depicted in the copyrighted plans and drawings. Unless the ultimate structure is a derivative work, the architect has no meaningful copyright at all in his copyrighted plans and drawings.

SECTIONS 107 THROUGH 118, LIMITATIONS ON THE AUTHOR'S EXCLUSIVE RIGHTS; A POSSIBLE CONSTITUTIONAL INFIRMITY

The constitutional provision granting Congress the power to legislate in the area of copyright provides that:

The Congress shall have Power . . . to promote the Progress of Science and useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.⁴⁰

The old law limited the author's term of copyright to 28 years with a renewal, but made his rights within that time period relatively exclusive.⁴¹ The only limitations in the old law were the so-called juke box exemption, the compulsory license provisions, and the court-created exception of fair use.⁴² Although section 106 of the new law provides that the copyright owner shall have exclusive rights, a number of statutory limitations on those exclusive rights, make them in essence non-exclusive, and are inflicted through sections 107 through 118. In addition, the duration of the remaining rights is extended to the life of the author plus 50 years.⁴³ The constitutional question, therefore, is whether Congress may properly enact legislation purportedly under the directive of the Constitution to secure for "limited times" to authors and inventors the "exclusive right" to their respective writings and discoveries, when the limited time is the life of the author plus 50 years, and the "exclusive right" is limited by the allowance of significant copying without the ap-

40. U.S. CONST. art. I, § 8, Cl. 8.

41. 17 U.S.C. § 24 (1970) (old law).

42. 17 U.S.C. §§ 1(e) and 101(e) (1970), and *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967). These exemptions represent areas in the old copyright law where encroachment upon the exclusive rights of copyright ownership are permitted. The juke box and compulsory license exemptions are statutory dilutions of the exclusivity of copyright in reproductions of musical non-dramatic works. The fair use exception is a judicial encroachment on the exclusive rights of the copyright owner which is applied where the use of the copyright material is without the owner's consent, but nonetheless made in a reasonable manner.

43. 17 U.S.C. § 302 (new law).

proval of the author, and without compensation to the author. Nimmer, in his treatise, suggests that the proposed term of life plus 50 years will pass constitutional muster.⁴⁴ He acknowledges, however, that no cases exist which have considered the issue.⁴⁵ Under the law of patents enacted pursuant to the same Article I, Section 8, Clause 8, and governed by the same "limited times" and "exclusive rights" language, the rights given the inventor seem far more consistent with the constitutional mandate. The term is for only 17 years and is not subject to renewal, but the exclusivity is such that a patent, when issued, will even prevent a third person who independently invents that same item from enjoying the fruits of that labor.⁴⁶

The Court in *Goldstein v. California*,⁴⁷ suggests that as to those works which are writings in the constitutional sense, the Court could choose to deny them federal copyright protection, and also preempt state protection.⁴⁸ This, of course, is the ultimate non-exclusive protection. The reasoning is that Congress, having the power to grant exclusive rights, can certainly choose to grant less than exclusive rights. However, if the copyright owner can convince the Court that Congress' power to act with respect to copyrights is exclusively governed by the copyright clause,⁴⁹ and that Congress' power must be exercised consistently with the constitutional source of that power then, Congress must do so by securing to the author for *limited times* the *exclusive right* to their writings, and no less. The new law, then, at least insofar as it places limitations upon those exclusive rights, would be unconstitutional. The success of any such chal-

44. 1 *Nimmer on Copyright*, § S.1 at 8 (1976).

45. *Id.* See however the dissenting views of Representative Robert F. Drinan to S.3976 (a bill dealing with copyright extension for sound recordings and extension of the renewal term of expiring copyrights for two additional years) as reported in H.R. REP. NO. 1581, 93d Cong. 2d Sess. 17 (1974), in which Representative Drinan expresses some doubt as to the constitutionality of the mere two year extension there involved, particularly when "... many of the inventors and authors, whose product we seek to protect, have been dead for a very long time."

46. 35 U.S.C. § 154 (1970); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969); and *Little Mule Corp. v. Lug All Co.*, 254 F.2d 268 (5th Cir. 1958), *cert. denied*, 358 U.S. 838 (1958).

47. 412 U.S. 546, 555-58 (1973).

48. *Id.* at 559.

49. See, 1 *Nimmer on Copyright*, § 9.1 at 27-28 (1976) for the suggestion that Congress could enact copyright legislation under the commerce clause.

lenge cannot be predicted. The fact that the doctrine of fair use was created first by the courts and only later by the Congress, in the form of section 107 of the new law, may not bode well for any such challenge. That challenge has not yet been made, nor lost, and it should not be overlooked.

FAIR USE, SECTION 107

The purpose of section 107 is to codify the judicially created doctrine of fair use, which grants the user a limited right to invade the author's copyright without being subject to an action for damages or injunction for infringement.⁵⁰ Section 107 sets forth four criteria which are to be considered by a court in determining whether a particular use of the work was fair. According to the House Report, no real definition of the concept of fair use has ever emerged, the doctrine being essentially an equitable rule of reason.⁵¹ The four criteria provided are purportedly those which have tended to reoccur in the cases discussing fair use.⁵² Unfortunately, little guidance is given by the Congress in section 107 as to how these four criteria are to be applied. Congress may very well have been able to obtain the same result by not even mentioning the illustrative criteria. With respect to the four criteria listed, it is clear that they are not the exclusive criteria that courts may consider. Thus, the section states that the factors to be considered shall "include" the enumerated four criteria. As set forth above, the word "include" is defined as being a word of illustration and not limitation.⁵³ The House Report goes on to expressly state that "[b]eyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt a doctrine to particular situations on a case by case basis. Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow or enlarge it in any way."⁵⁴ Section 107 thus neither adds to nor subtracts from the law of copyright as it existed prior to the enactment of the new statute. However, both authors and users must be vigilant in applying section 107

50. See, e.g., *Rosemont Enterprises Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966).

51. HOUSE REPORT, note 9, *supra* at 65.

52. See Act of Oct. 19, 1976, Pub. L. No. 94-553, 90 Stat. 2546. The four criteria provided are (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

53. 17 U.S.C. § 101 (new law).

54. HOUSE REPORT, note 9, *supra* at 66.

as it would seemingly be very easy to limit one's discussion to the court criteria given even though the statute and the reports expressly state that other criteria may also be considered in ruling on a defense of fair use.

A further problem with respect to the fair use exemption is that it may ultimately swallow up each of the other limitations and exemptions provided in sections 108 through 118, with the result that the very carefully designed balancing of interests reflected in those sections will be for naught, users being allowed to disregard limitations imposed in specified circumstances on the basis that though their use is broader than allowed by a given section, it is nonetheless a fair use within section 107.

That such a result is not mere idle speculation is readily apparent in section 108. Section 108 provides, in over two full pages of script, carefully constructed criteria with respect to when, and in what manner libraries and archives may make photocopies of copyrighted works without violating that copyright. Section 108 was undoubtedly motivated in part by the decision of the United States Court of Claims in *Williams & Wilkins Company v. United States*.⁵⁵ In that case the wholesale and systematic photocopying of entire articles, and on occasion entire journals was routinely undertaken by two libraries or archives which are arms of the United States Government. Nonetheless, the court of claims ruled that this wholesale, systematic and intentional copying of copyrighted articles and journals was a fair use and not subject to any copyright limitation. The copying by these libraries greatly exceeded the copying that they could properly do if they were governed by the requirements of section 108. However, section 108(f) provides that nothing in section 108 shall in any way affect the right of fair use as provided by section 107. Thus, it would appear that even after the enactment of the new law the libraries involved in the *Williams & Wilkins* case could continue, unabated, and without regard to the limitations of section 108, their wholesale copying under the guise of fair use.

Other sections limiting the copyright users right to invade the copyright owner's copyright without liability do not expressly deal with the applicability of section 107. It is rather apparent

55. 487 F.2d 1345 (Ct. Cl. 1973) *affd.* 420 U.S. 376 (1975).

however from the House Report that section 107 is arguably applicable in all cases. Thus, the House Report states that

the concentrated attention given the fair use provision in the context of classroom teaching activities should not obscure its application in other areas. *It must be emphasized again that the same general standards of fair use are applicable to all kinds of uses for copyrighted material* although the relative weight to be given them will differ from case to case.⁵⁶

COPYING BY LIBRARIES AND ARCHIVES, SECTION 108

Section 108 of the new law grants certain libraries and archives the right to make copies of copyrighted works, both portions of articles and entire journals, without infringing the author's copyright. Although no such specific exemption exists in the old law, the court of claims decision in *Williams & Wilkins* granting the libraries there involved rights to copy under the doctrine of fair use overshadows section 108.

Section 108 provides that a library or archive, if it meets certain conditions set forth in subpart (a), may produce one copy of a copyrighted work at any given time. Wisely, subdivision (g) while allowing more than one copy to be made if made at isolated and unrelated times, limits the exemption provided by section 108 where the library or archive, or its employees are aware or have the substantial reason to believe that the copying is the related or concerted reproduction of the same material or is the systematic reproduction or distribution of the material. However, the new law does not require the library or the person requesting the photocopy to demonstrate that an unused copy of the work cannot be obtained at a normal price from commonly known trade sources before the copy is made, except in the situation as set forth in section 108(c) of replacing a damaged, deteriorating, lost or stolen copy or phonorecord. If an unused copy can be obtained at a fair price from the publisher or the copyright owner, no ready justification should exist for allowing the free copying of any work in any circumstance.

As set forth above, those aspects of section 108 which might be considered salutary will be of little value if indeed the fair use exemption of section 107 can properly override all the criteria laid down in section 108. Section 108(f)(4) seems to allow for that result, and the decision of the court in *Williams & Wilkins* being, as it is, based upon the doctrine of fair use, would likewise compel such a result. Section 108(f)(4) does, at least, allow the copyright owner to obtain an agreement from

56. HOUSE REPORT, note 9, *supra* at 72.

subscribers limiting their rights to copy. To the extent a copyright owner can obtain such an agreement from a library or archive, he would certainly be well advised to do so, particularly one specifying that the *Williams & Wilkins* version of fair use will not apply.

THE EXEMPTION OF CERTAIN PERFORMANCES AND DISPLAYS FROM THE SCOPE OF COPYRIGHT PROTECTION, SECTION 110

Section 110 of the new law provides certain limitations on the right of the copyright owner to sue for damages for infringement, when the work is being performed or displayed for purposes which can be generally described as educational, religious, or otherwise nonprofit in nature. On the one hand, section 110 contains elements which are beneficial to authors, defining more clearly and with greater limitation, the extent of the use, through performance or display, that can be made of a work without infringement. On the other hand, section 110 contains elements so poorly drafted, either intentionally or through oversight, that the protection given the copyright owner is meaningless.

A prime example of the deficiency of section 110 is found in subpart 4. On the positive side, subpart 4 makes clear that a use of a work by performance, as in *The Robert Stigwood Group Ltd. v. O'Reilly*,⁵⁷ would clearly be impermissible.⁵⁸ Subpart 4 provides that if a notice of objection to performance, in form and content as authorized by the Register of Copyrights, is served on the user, the exemption of subpart 4 is lost. However, in a most ludicrous fashion the new law provides that the notice of objection must be served by the copyright owner at least seven days before the date of performance.⁵⁹ Amazingly, there is no requirement, however, that the copyright user give any notice to the copyright owner of an intent to use the work. Thus, the right to object to the performance is wholly illusory unless

57. 346 F. Supp. 376 (D.Conn. 1972).

58. In *Robert Stigwood, supra*, a group of Catholic priests engaged in producing over 50 productions of the rock opera, *Jesus Christ Superstar*, using professional paid actors. The defendants sought to excuse their infringement of plaintiff's copyright by relying upon the not-for-profit exemption found in Section 104 of the old law. The court considered their defense but ultimately ruled against them. Under the new law, the inability of defendants to raise such a defense is even more clear.

59. 17 U.S.C. § 110(4)(B)(ii) (new law).

by pure happenstance a copyright owner should learn at least seven days before the date of the performance that his work is to be performed.

Subpart 5 of section 110 contains another balancing of interests between copyright owners and users which, although well intended, may fail to fulfill its stated purpose as expressed by the House Report. Subpart 5 deals with the common situation of the use by a business proprietor of a radio, television or stereo phonograph or tape system to provide background or mood music for his establishment. Prior to the decision of the United States Supreme Court in *Twentieth Century Music Corp. v. Aiken*,⁶⁰ it was generally understood that an earlier case, *Buck v. Jewell-LaSalle Realty Co.*⁶¹ made such use an infringement of the copyright of those works being so performed. In *Aiken*, however, the United States Supreme Court ruled that the use by a business proprietor of a home radio receiver with four ordinary loud speakers placed throughout the business establishment, which was relatively small in size, would not be a performance by the business proprietor and therefore was not an infringement.⁶² The avowed purpose of the new law was to limit or overturn *Aiken* and to revitalize the rule of *Jewell-LaSalle*.⁶³

60. 422 U.S. 151 (1975).

61. 283 U.S. 191 (1931).

62. 422 U.S. at 164.

63. The majority of the Supreme Court in the *Aiken* case based its decision on a narrow construction of the word 'perform' in the 1909 statute. This basis for the decision is completely overturned by the present bill and its broad definition of 'perform' in Section 101. The Committee has adopted the language of Section 101(5), with an amendment expressly denying the exemption in situations where 'the performance or display is further transmitted beyond the place where the receiving apparatus is located'; in doing so, it accepts the traditionally, pre-*Aiken* interpretation of the *Jewell-LaSalle* decision, under which public communication by means other than a home receiving set, or further transmission of a broadcast to the public, is considered an infringing act. HOUSE REPORT, note 9, *supra* at 87.

While the Conference Committee did not adopt the House language, the legislative intent remained unchanged.

With respect to Section 110(5), the conference substitute conforms to the language in the Senate bill. It is the intent of the conferees that a small commercial establishment of the type involved in *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975), which merely augmented a home-type receiver and which was not of sufficient size to justify, as a practical matter, a subscription to a commercial background music service, would be exempt. However, where the public communication was by means of something other than a home-type receiving apparatus, or where the establishment actually makes a further transmission to the public, the exemption would not apply. CONFERENCE REPORT, note 29, *supra* at 75.

A further problem of Section 110(5) is its interrelation with § 111(a)(1). Section 111 as discussed, *infra*, deals with exemptions from infringement for certain secondary transmissions. Under § 111(a)(1) a secondary transmission, when not by a cable system, by the management of a hotel or apartment house, or similar establishment, to the private rooms of guests or residents, for which no direct

The problem with subpart 5 as written is that many business establishments which are large enough to justify requiring that they subscribe to a commercial background music service (which music service would pay for the privilege of performing copyrighted works) may very well be able to obtain the exemption because of the language in subpart 5. Thus, a cursory review of advertisements by stereo retailers readily reflects the fact that receivers and amplifiers of a kind commonly used in private homes are available with exceptionally high power outputs. These receivers or amplifiers could easily drive numerous small loudspeakers placed throughout a relatively large business establishment. Yet, the exemption would prevail.

SECONDARY TRANSMISSIONS AND COMPULSORY LICENSES (CABLE TELEVISION), SECTION 111

Comprising several pages of the new law, section 111 provides for the compulsory licensing of secondary transmissions of copyrighted works, as well as for limitations on when such secondary transmission is permissible. One of the major deficiencies of the section is its complexity. It cannot be denied that it is wordy, convoluted, and not likely to be easily understood by the ordinary reader. Compounding these difficulties is the fact that the essential determinations required by section 111 as to the scope of the exemption and the circumstances

charge is made, is exempt. If this exemption is stretched too far it would have the effect of nullifying the limitations imposed by § 110(5) on *Buck* or *Aiken* type secondary transmissions. Both the HOUSE REPORT and the CONFERENCE REPORT, as quoted above, reflect Congress' intention that § 110(5) have a meaningful effect. Neither *Buck* nor *Aiken* are mentioned in either the HOUSE REPORT or the CONFERENCE REPORT discussions of § 111. The two sections can be read consistent with each other only so long as each is strictly limited to its own terms. Thus, § 111 can only allow secondary transmissions into *private* lodging rooms or areas. HOUSE REPORT at 91. Any secondary transmission as was done in *Buck* into public areas (i.e., dining areas, hallways or lobbies) would be an infringement under § 110(5)(B) which would not be saved by § 111(a)(1). If the phrase "private lodgings" in § 111(a)(1) is read expansively it would have the effect of nullifying § 110(5)(B). "Private lodgings" in § 111(a)(1) must, therefore, as the section itself and the HOUSE REPORT suggests, be read to refer to those rooms or areas used as living quarters. Any secondary transmission into any other area of the establishment would be an infringement that would not be exempt under § 110(5)(B). *Buck* is thus legislatively overruled only to the extent *Buck* disallows secondary transmissions into the private lodgings of the guests or residents. *Buck* is still valid as to secondary transmissions into all other areas of a business establishment.

under which compulsory licensing is required are to be made by reference to "the rules, regulations, and authorizations of the Federal Communications Commission."⁶⁴ From the copyright owner's viewpoint the best legislation would of course be a single statement that any secondary transmission constitutes an infringement of copyright. Unfortunately for copyright owners, the United States Supreme Court in *Fortknighly Corp. v. United Artists Television, Inc.*⁶⁵ and subsequently in *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*⁶⁶ ruled that, at least under the old law, the secondary transmission would not constitute a performance of the copyrighted work constituting an infringement. Congress, in enacting the new law, was thus faced with a conflict of special interest groups, and section 111 is its response.

The heart of section 111 is its compulsory license feature for secondary transmissions by cable systems. These cable systems may be for transmission of either television or radio programs, or both. The major deficiency of the compulsory license system is that the amount of the license fee is dependent solely upon the gross receipts paid by subscribers to the cable system. To the extent that a cable system is able to obtain additional revenues from any other sources that revenue is not included when the fee is computed. No reason is given in the House Report in its discussion concerning copyright royalty payments under the compulsory license for secondary transmissions why only gross subscriber revenue was to be the determining factor in setting the license fee.⁶⁷

Section 111(f) defines various terms used throughout that section including "primary transmission," "secondary transmission," "cable system," "local service area of a primary transmitter" and "distant signal equivalent." Unfortunately, as set forth above, some of these definitions themselves are defined by reference to the rules, regulations and authorizations of the Federal Communications Commission.⁶⁸ A further complication is that as to some definitions the rules, regulations or authorizations of the Federal Communications Commission referred to are those in effect on April 15, 1976; whereas, in other circumstances they are apparently those in effect on the date that any

64. See, e.g., §§ 111(b), 111(c), and 111(f). At the very least, Section 111 requires copyright owners and copyright users to subscribe to or be readily familiar with the Code of Federal Regulations and the Federal Register.

65. 392 U.S. 390 (1968).

66. 415 U.S. 394 (1974).

67. HOUSE REPORT, note 9, *supra* at 96-97.

68. See, note 50, *supra*.

claim is made that section 111 has been violated.⁶⁹ Had the reference in all cases been solely to the rules, regulations or authorizations in effect on April 15, 1976, the Register of Copyright by regulation or announcement could have provided in routine fashion to copyright owners and users in readily usable form the information contained in those rules, regulations and authorizations.⁷⁰

LIMITATIONS ON COPYRIGHT IN PICTORIAL, GRAPHIC AND SCULPTURAL WORKS—USEFUL ARTICLES, SECTION 113

Section 113(a) allows the owner of a copyright to pictorial, graphic or sculptural work (as described in section 106) to reproduce that work "in or on any kind of article, whether useful or otherwise." That right is limited in two respects.

Copyright under section 113 will not prevent the making, distribution or display of pictures or photographs of copyrighted works, reproduced in useful articles which have been offered for sale or otherwise distributed to the public, when the pictures or photographs are used in advertisements concerning the distribution of the useful article or news reports concerning the useful article.⁷¹ The House Report offers no helpful com-

69. Compare the definition for "secondary transmission" which is dependent upon the rules, regulations or authorizations of the Federal Communications Commission, (apparently in effect at any future date) with the definition for "local service area of a primary transmitter" which refers to the rules, regulations and authorizations of the Federal Communications Commission in effect on April 15, 1976.

70. As is made clear by the HOUSE REPORT at 99, the extent of the applicability of Section 111 and the compulsory license provisions contained therein is dependent not only upon the activities of the cable system but also upon the size of the relevant market, both of which are themselves defined by other regulations of the Federal Communications Commission.

The definition of 'local service area of a primary transmitter' establishes the difference between 'local' and 'distant' signals and therefore the line between signals which are subject to payment under the compulsory license and those that are not. It provides that the local service area of a television broadcast station is the area in which the station is entitled to insist upon its signal being retransmitted by a cable system pursuant to FCC rules and regulations. Under FCC rules and regulations this so-called 'must carry' area is defined based upon the market size and position of cable systems in 47 C.F.R. §§ 76.57, 76.59, 76.61 and 76.63. HOUSE REPORT, Note 9, *supra* at 99.

It is thus readily apparent that litigation with respect to whether or not the compulsory license provisions are applicable will be an extremely expensive endeavor. Even under the old law, which lacked the complexities of the new one, cable television cases, as reflected by the size of the parties, were costly and beyond the reach of the ordinary copyright owner.

71. 17 U.S.C. § 113(c) (new law).

mentary as to the purpose that is to be served by this section. An example of a use that would probably fall within section 113(c), and thus be protected from a claim of infringement, would be an advertisement for a woman's dress where the dress was made of fabric printed with a copyrighted design. Any such use of the copyrighted design imprinted upon the fabric would literally fall within section 106, and would not, therefore, be an allowed use under section 109.⁷² However, in order to ensure that the publication of such picture or photograph does not mislead, it would seem a worthwhile addition to the section to require that when such picture or photograph of the article is published that it be accompanied by a notice that the work incorporated or reproduced in the useful article is subject to copyright.

Section 113(b) of the new law makes no change in the old law. In fact, it states that under the new law the owner of copyright "in a work that portrays a useful article as such," is not afforded

any greater or lesser rights with respect to the making, distribution, or display of the useful article so portrayed than those afforded to such works under the law, whether title 17 or the common law or statutes of a State, in effect on December 31, 1977, as held applicable and construed by a court in an action brought under this title.⁷³

According to the House Report, the rights granted the copyright owner with respect to such useful articles are to be determined on a case by case basis as in the past. Therefore, as with definitions of pictorial, graphic and sculptural works and useful articles, as discussed above, the beginning point must always be *Mazer v. Stein*.⁷⁴

The House Report asks the question "[t]o take the example usually cited, would copyright in a drawing or a model of an automobile give the artist the exclusive right to make automobiles of the same design?"⁷⁵ The House Report does not answer the question but seems to suggest that the answer should be in the negative:

The 1961 Report of the Register of Copyrights stated, on the basis of judicial precedent, that 'copyright in a pictorial, graphic or sculptural work, portraying a useful article as such, does not extend to the manufacture of the useful article itself,' and recommends specifically that 'the distinctions drawn in this area by existing court decisions' not be altered by the statute.⁷⁶

72. Section 109 of the new law provides that an owner of a copy or phonorecord of a work which is lawfully made and owned may sell or otherwise dispose of the copy or phonorecord and in certain cases may display that copy publicly without violating the copyright owner's copyright.

73. HOUSE REPORT, note 9, *supra* at 105.

74. 347 U.S. 201 (1954).

75. HOUSE REPORT, note 9, *supra* at 105.

76. *Id.*

In fact, however, the logic of the court's decision in *Esquire, Inc. v. Ringer*⁷⁷ would seem to compel an affirmative answer. In *Esquire*, as noted above, the court ruled that an obviously utilitarian, but nonetheless decorative outdoor lighting fixture would be subject to copyright protection. If the fixture itself was subject to copyright protection, then, *a fortiori*, a drawing of that fixture, whether made before or after the manufacture of the fixture, would itself be subject to copyright protection as a pictorial, graphic or sculptural work. If both a drawing of the fixture and the fixture itself are subject to copyright, then one is easily a derivative work of the other under the definition of derivative work as found in section 101. Under section 106(2) the copyright owner has the right to prepare derivative works based upon his own copyrighted works. The net result is that, notwithstanding the limitations which the Register of Copyrights seeks to impose, or those which the House Report suggests exists, if the useful article contains any element which can be considered artistic it is not for the Register of Copyright to attempt to measure that artistic component.⁷⁸ Hence, if a copyrighted work portrays a useful article, which useful article is in any way "artistic," the copyright owner will indeed have the right to produce or to prevent others from producing that useful article.

This result is not astounding; nor is it unduly disruptive of commerce. Copyright does not now, nor will it under the new law, prevent others from using the same basic idea to express themselves individually. Copyright extends only to the expression, and not the idea.⁷⁹ Thus, the mere fact that a copyright owner has expressed in a pictorial, graphic or sculptural work an original design of a useful article does not mean that no other craftsman or artist may himself create an original design of a similar useful article. Others are simply prevented from copying. Further, to the extent any such design is made by an employee, the owner of copyright will be the employer.⁸⁰ Hence, if an employee of General Motors produces, as a part of his employment, a drawing or model of an automobile, General Motors

77. 414 F. Supp. 939 (D.D.C. 1976).

78. *Id.* at 941.

79. *See*, 17 U.S.C. § 102 (new law); and HOUSE REPORT, note 9, *supra* at 57.

80. 17 U.S.C. § 201(b) (new law). *See also* the definition of "work made for hire" in § 101 of the new law 17 U.S.C. § 101. Works by an employee within the

will own the copyright in that drawing or model. General Motors then has the right to produce automobiles from that design, and also has the right to prevent others from doing so.

Finally, as copyright only protects that which is original as to the author, the right of a copyright owner to prevent others from producing useful articles of a similar design will only extend to those portions of the useful article which meet that requirement of originality.⁸¹ If a copyright owner's expression of the useful article is similar to numerous other public domain expressions of the same or similar articles, the alleged infringer will likely be able to show that his expression was derived from those public domain works.

SOUND RECORDINGS AND COMPULSORY LICENSES FOR MAKING AND DISTRIBUTING PHONORECORDS, SECTIONS 114 AND 115

Section 114 retains protection provided under the old law for sound recordings. As that term is defined by section 101 of the new law, the person who fixes a series of musical, spoken or other sounds (but . . . not including sounds which accompany audiovisual works) has created works known as sound recordings regardless of the nature of the material objects, whether they be disks, tapes or any other type of phonorecord, in which those sounds are embodied. The copyright owner of sound recordings has the right to prevent others from making duplicates of those sounds under section 114(a) and (b). Section 114 thus extends protection only to the exact sounds as fixed on a phonorecord, prohibiting their exact reproduction. Section 114 does not prohibit others from independently recreating and recording those sounds even though such recreation is a virtual imitation of the sounds fixed in the sound recording.

Nonetheless, should an imitation of the sounds fixed in the

scope of his or her employment are automatically works made for hire. As to works specially ordered or commissioned, § 101 provides that they will be works made for hire only if there is an agreement in writing which specifically so provides, *and* the work is to be used as a contribution to a collective work, as a part of a motion picture or other audio visual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test or as an atlas. The implication of the section, and the explanatory language of the HOUSE REPORT at page 121, is that as to all other classes of work they cannot be considered works made for hire, even by agreement. As to these latter works, the person specially ordering or commissioning them could become the copyright owner only by a transfer from the author.

81. 17 U.S.C. § 102(a); and HOUSE REPORT, note 9, *supra* at 51 and 57.

sound recording be made, the person so making that imitation will have to comply with the compulsory license provisions of section 115 when the sounds fixed in the sound recording are non-dramatic musical works. Under section 115 as presently available under sections 1(e) and 101(e) of the old law, the right to reproduce a phonorecord of a copyrighted work is *only* available when the work is a non-dramatic musical work. A copyright user thus may not rely upon the provisions of the compulsory license provided by section 115 to make a phonorecord of a dramatic musical work or of a dramatic or non-dramatic literary work, or any other non-dramatic musical work. As to such categories of works, the making of a phonorecord will require the express approval of the copyright owner of the underlying work, or it will constitute an infringement.⁸²

Sections 114 and 115 will not affect statutes such as that involved in *Goldstein v. California*⁸³ with respect to the pirating of musical compositions fixed prior to February 15, 1972. A sound recording fixed before that date would not have been subject to copyright protection under the old law,⁸⁴ and it does not acquire copyright protection under the new law. The *Goldstein* court concluded that California could, under state law, properly prevent the duplication of such sounds by a penal statute.⁸⁵ Further, the Third, Fifth, Ninth, and Tenth Circuits have ruled that a record pirate cannot, by simply paying the compulsory license fees, obtain the right to pirate such recordings under the compulsory license sections of the old law.⁸⁶ Section 114 and section 115 of the new law retain this rule. Section 301(c) preserves the vitality of the *Goldstein* decision and continues to allow state law to protect sound recordings fixed prior to February 15, 1972, at least until February 15, 2047.

82. See, 17 U.S.C. §§ 102 and 106(1) which gives the copyright owner the exclusive right to make phonorecords of the work (subject to §§ 107-118).

83. 412 U.S. 546 (1973).

84. *Id.* at 552; see also CAL. PENAL CODE § 653k.

85. 412 U.S. at 570-71.

86. *Jondora Music Publishing Co. v. Melody Recordings, Inc.*, 506 F.2d 392 (3d Cir. 1974, as amended 1975), *cert. denied*, 421 U.S. 1012 (1975), *Fame Publishing Co. v. Alabama Custom Tape, Inc.*, 507 F.2d 667 (5th Cir.), *cert. denied*, 423 U.S. 841 (1975), *Duchess Music Corp. v. Stern*, 458 F.2d 1305 (9th Cir.), *cert. denied*, 409 U.S. 847 (1972), and *Edward B. Marks Music Corp. v. Colorado Magnetics, Inc.*, 497 F.2d 285, *aff'd on rehearing en banc*, 497 F.2d 292 (10th Cir. 1974), *cert. denied*, 419 U.S. 1120 (1975).

COIN-OPERATED PHONORECORD PLAYERS, SECTION 116

One of the most anomolous provisions contained in the old law was the so-called jukebox exemption of section 1(e). As chronicled in the House Report, numerous efforts had been made to remove that exemption, but none were successful prior to the enactment of the new law.⁸⁷ While copyright owners of works performed in coin-operated phonorecord players (jukeboxes) would undoubtedly have preferred no exemption whatsoever; the new law, with its requirement for the payment of an \$8.00 yearly fee for each phonorecord player, should be welcomed. The biggest problem to be encountered under this exemption will undoubtedly be with respect to the distribution of the proportionate share of the proceeds of the fee to all copyright owners of works used in such devices. As section 116(c) contains an exemption from the antitrust laws to allow copyright owners to deal through performing rights societies (such as ASCAP, BMI and SESAC), these societies will undoubtedly act to substantially ease the burden for the copyright owner.

CONCLUSION

The above discussion demonstrates that the new law is deficient or uncertain in several respects. The new law is, without doubt, cumbersome, complex and corpulent. It is as though the drafters of the new law, having decided that we now live in a more complex society, concluded that a more complicated law is needed to deal with that complexity. In an area such as copyright, with every citizen of this nation a potential copyright owner, a simpler law would surely have been preferred. To the extent that the new law contains conflicts, inconsistencies and ambiguities as to the protection afforded copyright owners and the rights given copyright users, interpretation by Congress or the courts is necessary. When such interpretation occurs, the Constitutional preseciption of article I, section 8, clause 8, to "promote the Progress of Science and useful Arts, by securing for *limited Times* to Authors and Inventors the *exclusive Right* of their respective Writings and Discoveries" should be kept in mind. All of these conflicts, inconsistencies and ambiguities should be resolved in favor of the copyright owner. The new law was over ten years in the making and was indeed an ambitious project. It is unfortunate, that after so many years, and so much effort, problems and uncertainties such as those discussed in

87. HOUSE REPORT, note 9, *supra* at 111-113.

this article still remain for case by case determination.⁸⁸ The new law may survive and prove quite successful. Its chance of success would seem to be increased if its drafters would heed the doctor's typical warning to lose some weight and tighten up the flabby muscles.

88. It is noteworthy that even the Register of Copyrights, Barbara Ringer, who has pressed for the passage of the new law has expressed some grave doubts about its effect on American authors.

A final observation is in order. Imperfect and antiquated as they all have been, our copyright laws up to now have been based on the harsh but free system of enterprise that grew up in England and America. Under this system authors are free to write and live by writing if they can manage to command the attention of a large enough segment of the populace to make the dissemination of their works even marginally profitable.

It is hard to predict what the effect of the revised copyright law of the United States will have on this system. The revision bill, in important respects, seems to have adopted a posture of hostility to the concept of the free market. In certain areas, the new law would intrude the government into the process of establishing the 'value' of certain uses of copyrighted works. If the various compulsory licenses and Royalty Tribunals or Commissions are allowed to establish precedents for the general conditions and terms of authorship, we will be running the risk of losing something that took two centuries of development to create. That is, a real market place in ideas and art, an irredeemably precious component of our individualism, still existing miraculously in an age increasingly uncomfortable in the company of individualists B. Ringer, *Two Hundred Years of American Copyright Law*, 200 YEARS OF ENGLISH AND AMERICAN PATENT, TRADEMARK AND COPYRIGHT LAW 130 (Am. Bar Ass'n, 1976).

